

STATE OF MICHIGAN
COURT OF APPEALS

DOROTHY CREECH,

Plaintiff-Appellee,

v

W. A. FOOTE MEMORIAL HOSPITAL, INC.
and STERIS CORPORATION,

Defendants-Appellants.

UNPUBLISHED

August 17, 2006

No. 237437

Jackson Circuit Court

LC No. 00-005650-NH

ON SECOND REMAND

JAY C. PORTER,

Plaintiff-Appellee,

v

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

No. 237438

LC No. 00-005711-NO

SARAH E. WILLIAMS, JOHN WALLACE, and
SHARON WALLACE,

Plaintiffs-Appellees,

v

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

No. 237439

LC No. 00-005740-NH

JERRY RICHARD MOORE, SHEREE MOORE,
DENISE REYNOLDS, and GLEN REYNOLDS,

Plaintiffs-Appellees,

v

No. 237440
LC No. 00-005752-NH

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

JAY ANSON, DOUGLAS AYLESWORTH,
JANET BEILFUSS, CHARLES BELTZ,
THEODORE BREZINSKI, REBECCA BURT,
RENE CHAPA, DAVID CLAUCHERTY,
MAURINE CORYELL, MARY CRANDALL,
DIANE EMERY, LINDA FARLEY, JOLA
FARRELL, LESTER FIDLER, MARK E.
GORZEN, MARY GREEN, RUTH HALE,
SHAWN HAMLIN, BARBARA JEAN HARDEN,
HERBERT ISAACS, MARY JACOBSON, PAUL
KOZLOWICZ, RAY LEWIS, TERESA MAY,
DAVID CLYDE MEISTER, LUCILLE MEYER,
KEVIN MILLER, NICHOLAS MILLER,
DONALD MOON, RUBY MONTGOMERY,
CAROLINE MYERS, ARTHUR NASTALLY,
SUSAN PERRY, TERRY PHALEN, RONALD
RACER, ROBERT REESE, ROBERT
RICHARDSON, VALERIE RODERICK,
LUCILLE SEPTA, DANNY SMITH, FRED
STEWART, ROBERT THOMAS, ROY LEE
THOMASSON, JANET TODD, PATRICIA
TREFRY, TONE TRUSTY, KIMBERLY
TUCKER, CHARLES WALKER, STEPHANIE
WALSH, KATHLEEN WILSON, BERNARD
YAGER, SUSAN AYLESWORTH, LINDA
BREZINSKI, MRS. CLAUCHERTY, STEVEN D.
EMERY, WILLIAM A. FARLEY, JR., SHIRLEY
FIDLER, SUE GORZEN, EUGENE GREEN,
JOYCE ISAACS, LAWRENCE O. JACOBSON,
JOAN KOZLOWICZ, JAMES P. MAY,
PHYLLIS A. MEISTER, JAMES MEYER, DEE
MOON, EMILY NASTALLY, MARY PHALEN,
MARY E. RICHARDSON, JEAN STEWART,
PHYLLIS J. THOMAS, SANDRA F.
THOMASSON, MARIA TRUSTY, GENE T.
TUCKER, KIMBERLY WALKER, JASON

WALSH, JACK WHEELER, JOY YAGER, and
ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

No. 237441

LC No. 01-000755-NO

JERRY RICHARD MOORE, SHEREE L.
MOORE, DENISE REYNOLDS, GLEN
REYNOLDS, and ALL OTHERS SIMILARLY
SITUATED,

Plaintiffs-Appellees,

v

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

No. 237442

LC No. 00-005752-NH

DOROTHY CREECH and ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

W. A. FOOTE MEMORIAL HOSPITAL, INC.
and STERIS CORPORATION,

Defendants-Appellants.

No. 237443

LC No. 00-005650-NH

SARAH E. WILLIAMS, JOHN WALLACE,
SHARON WALLACE, and ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

No. 237444

LC No. 00-005740-NH

JAY C. PORTER and ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

No. 237445

LC No. 00-005711-NH

JAY ANSON, DOUGLAS AYLESWORTH,
JANET BEILFUSS, CHARLES BELTZ,
THEODORE BREZINSKI, REBECCA BURT,
RENE CHAPA, DAVID CLAUCHERTY,
MAURINE CORYELL, MARY CRANDALL,
DIANE EMERY, LINDA FARLEY, JOLA
FARRELL, LESTER FIDLER, MARK E.
GORZEN, MARY GREEN, RUTH HALE,
SHAWN HAMLIN, BARBARA JEAN HARDEN,
HERBERT ISAACS, MARY JACOBSON, PAUL
KOZLOWICZ, RAY LEWIS, TERESA MAY,
DAVID CLYDE MEISTER, LUCILLE MEYER,
KEVIN MILLER, NICHOLAS MILLER,
DONALD MOON, RUBY MONTGOMERY,
CAROLINE MYERS, ARTHUR NASTALLY,
SUSAN PERRY, TERRY PHALEN, RONALD
RACER, ROBERT REESE, ROBERT
RICHARDSON, VALERIE RODERICK,
LUCILLE SEPTA, DANNY SMITH, FRED
STEWART, ROBERT THOMAS, ROY LEE
THOMASSON, JANET TODD, PATRICIA
TREFRY, TONE TRUSTY, KIMBERLY
TUCKER, CHARLES WALKER, STEPHANIE
WALSH, KATHLEEN WILSON, BERNARD
YAGER, SUSAN AYLESWORTH, LINDA

BREZINSKI, MRS. CLAUCHERTY, STEVEN D.
EMERY, WILLIAM A. FARLEY, JR., SHIRLEY
FIDLER, SUE GORZEN, EUGENE GREEN,
JOYCE ISAACS, LAWRENCE O. JACOBSON,
JOAN KOZLOWICZ, JAMES P. MAY,
PHYLLIS A. MEISTER, JAMES MEYER, DEE
MOON, EMILY NASTALLY, MARY PHALEN,
MARY E. RICHARDSON, JEAN STEWART,
PHYLLIS J. THOMAS, SANDRA F.
THOMASSON, MARIA TRUSTY, GENE T.
TUCKER, KIMBERLY WALKER, JASON
WALSH, JACK WHEELER, JOY YAGER, and
ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v

No. 237446
LC No. 01-000755-NO

W.A. FOOTE MEMORIAL HOSPITAL, INC.,

Defendant-Appellant.

Before: O'Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

In two orders, our Supreme Court has remanded this matter for reconsideration of our prior decision in light of *Henry v Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005), and has vacated this Court's order remanding the matter to Jackson Circuit Court for further findings, directing the Court to make a determination of the question whether plaintiffs have presented valid tort claims.

A trial court's decision on a motion for summary disposition under MCR 2.116(C)(8) is reviewed de novo. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). MCR 2.116(C)(8) tests the legal sufficiency of the complaint and permits dismissal of a claim when the opposing party has failed to state a claim on which relief can be granted. Only the pleadings are examined, and where the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery, the motion should be granted. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).

In *Henry, supra*, the plaintiffs alleged that they sustained injuries due to defendant's negligent release of dioxin into the Tittabawassee River flood plain. Periodic flooding deposited varying levels of dioxin on their properties, resulting in their potential exposure to the effects of the toxic chemical. One of the classes of plaintiffs sought a court-supervised program of medical monitoring for the possible negative health effects of dioxin discharged from the defendant's Midland plant. The defendant moved for summary disposition of the medical monitoring claim

under MCR 2.116(C)(8), asserting that because the plaintiffs had not established any present physical injuries, they failed to state a valid negligence claim. The trial court denied the motion, and this Court denied leave to appeal.

In the Supreme Court, the plaintiffs specified that they were not seeking compensation for physical injury or enhanced risk of future injury. *Henry, supra* at 73 n 4. Our Supreme Court held that the elements of a negligence action implicitly require that a plaintiff establish an actual injury. *Id.* at 74. The Court noted that it had never squarely addressed the injury requirement because it had not been presented with such a claim. *Id.* at 75. However, the Court “reaffirm[ed] the principle that a plaintiff must demonstrate a present physical injury to person or property *in addition to* economic losses that result from that injury in order to recover under a negligence theory.” *Id.* at 75-76 (emphasis in original). Fear of future injury or illness, however reasonable, is not enough to state a claim of negligence. *Id.* at 79.

Since the plaintiffs in *Henry* expressly disclaimed an actual physical injury, the case provides no guidance as to what constitutes an actual physical injury. Our Supreme Court indicated that the distinction between an “injury” and the “damages” flowing therefrom has not been finely delineated by the courts of this state. *Id.* at 75. The Court made no further development of that distinction, other than to find that in all known Michigan negligence cases, the plaintiff has satisfied both the damages element and the injury requirement. *Id.*

Unlike the facts of *Henry*, plaintiffs in the present case were in direct physical contact with the tortious agent: the unsterile endoscopes that were inserted into their bodies. They assert that this constitutes an actual physical injury. While they presumably consented to the surgical procedures, they certainly did not consent to a bodily invasion with contaminated instruments. In addition, they assert that the subsequent tests recommended by defendants required the drawing of blood, which they claim was a second physical invasion of their bodies.

The multiple complaints in this matter allege damages with varying degrees of specificity. For example, plaintiff Creech’s complaint only alleged that defendant hospital breached its duty, proximately causing her injury and damages. Plaintiff Porter’s complaint sought all economic and non-economic damages allowed by Michigan law, including compensation for pain and suffering, possible infection, possible permanent disability, necessary medical care, treatment and services, and restitution for the cost of endoscopies. Plaintiff Moore’s complaint alleged that he sustained severe bodily injuries, shock and emotional damage, possible aggravation of pre-existing conditions, inability to attend to usual affairs, inability to render services, and pain and suffering. Plaintiff Anson’s complaint alleged exposure to and risk of infection from blood borne pathogens, apprehension, fear, embarrassment and humiliation, and a continuing need for blood tests.

To the extent that the complaints seek damages based upon the anticipation of a future injury or medical monitoring of that anticipated future injury, or based only upon some future physical injury such as a latent disease or the fear of such a disease, they do not survive *Henry, supra*. The complaints only vaguely identify the damages alleged. Although the language of the complaints is arguably broad enough to encompass present physical injuries, physical injury by itself does not support a negligence claim, as damages are an element of negligence. *Haliw v Sterling Hts*, 464 Mich 297, 309-310; 627 NW2d 581 (2001). Thus, partial summary disposition

is appropriate concerning plaintiffs' claims based solely on future damages or monitoring of these future damages.

Additional proceedings are necessary in the trial court. Under MCR 2.116(I)(5), if a motion for summary disposition is granted under MCR 2.116(C)(8), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless evidence before the court shows that amendment would not be justified. Thus, plaintiffs are to be given the opportunity to amend their complaints to specify the damages that are based on a present physical injury and can properly support a cause of action. If there are no damages other than those based on fear of future injury, summary disposition of plaintiffs' entire complaints should be granted for defendants.

Reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Kathleen Jansen

/s/ Christopher M. Murray